WEBINAR WEDNESDAYS

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THE ADMISSIBILITY AND PRESENTATION OF BUSINESS RECORDS

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Highway to The Danger Zone: Mistrials and Misconduct in Closing Argument

1

ETHICAL RULE 3.3: CANDOR TO THE COURT

A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

2

ETHICAL RULE 3.4: FAIRNESS TO OPPOSING PARTY

A lawyer shall not:

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

***

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

***

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

3

ETHICAL RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

4

Standard on Prosecutorial Misconduct

"To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Morris*, 215 Ariz. 324, 335, ¶ 46, 160 P.3d 203, 213 (2007) (internal quotation omitted). In other words, the "misconduct must be so pronounced and persistent that it permeates the entire atmosphere of the trial." *Id.* (internal quotation omitted). Prosecutorial misconduct constitutes reversible error only if "a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying [the] defendant a fair trial." *Id.* (internal quotation omitted).

State v. Arias, 248 Ariz. 546, 555, 462 P.3d 1051, 1060 (Ct. App. 2020), as amended (Apr. 21, 2020), review denied (Nov. 3, 2020)

5

Closing Argument Test

Prosecutors are given "wide latitude" in presenting closing argument to the jury… In determining whether an argument is misconduct, "we 'consider two factors: (1) whether the prosecutor's statements called to the jury's attention matters it should not have considered in reaching its decision and (2) the probability that the jurors were in fact influenced by the remarks.' " We "look[ ] at the context in which the statements were made as well as 'the entire record and to the totality of the circumstances.' "

State v. Goudeau, 239 Ariz. 421, 466, 372 P.3d 945, 990 (2016)(citations omitted)

6

One Critical Point

- Context Matters!
  - Was the comment a fair response to defense counsel's argument?
  - Was the normally objectionable comment acceptable because of the unique fact pattern?

7

"Vouching"

- Expressing Personal Opinion
  - As to Guilt
  - As to Credibility of a Witness
- Placing the "Prestige of the Government" behind a witness
- Referring to Information Outside the Evidence
  - Police reports, other investigation, precluded evidence, etc.
  - Demonstrative Evidence

8

Personal Opinion on Guilt

"Ladies and gentlemen of the jury, **I feel that** the necessary elements of both of these charges have been fully proved. Not only by competent evidence, by overwhelming evidence. **In my opinion**, people seldom, if ever, you will seldom if ever find a criminal case that affords the great amount of proof that we were able to present to you in this case."

State v. Abney, 440 P.2d 914, 915 (Ariz. 1968)

Remember Mr. Hueske. He said he measured that fragment. They were what made up the bullet. He testified they were high intensity type of bullets and that they had a strong knock down power whatever they hit *so was there a substantial likelihood Shane and Jerry were going to be injured or be killed**. I think so ladies and gentlemen based on the evidence.***

State v. Van Den Berg, 791 P.2d 1075, 1079 (Ct. App. 1990)

9

Personal Opinion on Guilt

His statement that **"the State went all out of its way to get another criminal in to put the finger on him,"** urges the jury to convict because the state had worked so hard to bring appellant to trial, and not because the evidence proved him guilty beyond a reasonable doubt. That remark and the one immediately following it asking the jurors not to telephone and apologize for a vote of acquittal called to the attention of the jurors "matters which they would not be justified in considering in determining their verdict." Sullivan v. State, 47 Ariz. 224, 238, 55 P.2d 312, 317 (1936). Finally, the prosecutor's statement, **"He's guilty, guilty, guilty,"** went beyond comment on the evidence, and by virtue of its sheer repetition, became what appears to be a statement of personal opinion as to guilt.

State v. Filipov, 118 Ariz. 319, 324, 576 P.2d 507, 512 (Ct. App. 1977)

10

Personal Opinion on Guilt and Credibility

[Prosecutor]: * * * In making my closing argument, I would like to more or less take things in the order in the way they came. Then I will run over them step by step and tell you **why I *personally* think**—

[Defense Attorney]: Your Honor, we will object to the county attorney's personal opinion.

[The Court]: Sustained.

[Prosecutor]: **And I don't think Mary _ _ was up there lying to you. I don't think she ever lied to you**.

[Defense Attorney] Your Honor, again, I will object to counsel presenting his personal opinion.

[The Court]: Sustained. Please refrain from doing so.

[Prosecutor]: **The State believes she was telling the truth**.

[Defense Attorney]: Your Honor, once again I will object.

State v. King, 110 Ariz. 36, 41, 514 P.2d 1032, 1037 (1973)

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Personal Opinion on Guilt and Credibility

But I can absolutely assure you of one thing, and that's the kind of remarks [defense counsel] made***, the State wouldn't have put Mr. Calaway on the witness stand if they didn't believe every word out of his mouth about the conversations he had***.

State v. Vincent, 159 Ariz. 418, 423, 768 P.2d 150, 155 (1989)

Let's start with Hector Mendoza**. Now, I told you earlier on about the obligations of the prosecutor, and one of the obligations is that *you don't charge such a serious crime of murder unless you have the proof and the evidence to back it up.*** It's just too serious a charge against any one individual, and one must exercise a great deal of prosecutorial discretion.

State v. Hernandez, 170 Ariz. 301, 308, 823 P.2d 1309, 1316 (Ct. App. 1991)

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Personal Opinion on Guilt and Credibility

The prosecuting attorney also stated to the jury:
'This is probably one of the clearest cases I have ever taken to trial, and I think, at least in my own mind, there is not any question, any serious question that Mr. Byrd is guilty of the charge on this case.'

State v. Byrd, 109 Ariz. 10, 11, 503 P.2d 958, 959 (1972)

13

"I Submit"

'I submit to you that the facts presented in this case show beyond a reasonable doubt that the defendant did, in fact, make a false telephone message, and the elements of the statute have been clearly satisfied.'

The State urges that the prosecutor's remarks were not expressions of a personal opinion in regard to the appellant's guilt, but rather were justifiable inferences from the facts presented to the jury. We concur that the statement by the County Attorney was not error.

State v. Galbraith, 559 P.2d 1089, 1093 (Ct. App. 1976)

VS

But she didn't do that. What **she told you** was, and **I submit to you honestly,** was, no, I just can't tell you, I don't know her. I think those were Gina's words. I don't know her. I can't tell you that's the same person, but she looks just like that person.

We agree with Forde that the prosecutor improperly vouched for Gina by conveying his personal belief that she had testified honestly.

State v. Forde, 315 P.3d 1200, 1220 (2014)

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"We Know"

Try to avoid the phrase "we know," but it is OK when used to "marshal evidence admitted at trial" or when being used as a shorthand for "we know from the evidence," such as:

We know that the defendant was present because of the eyewitnesses

We know he touched the gun because of the fingerprint evidence

We know he had sex with the victim because he admits to it

See Generally State v. Acuna Valenzuela, 426 P.3d 1176, 1197 (2018) and *United States v. Younger,* 398 F.3d 1179, 1191 (9th Cir.2005).

15

First Person Pronoun "I"

When it comes to the use of a first-person pronoun, "it is preferable that counsel avoid arguing in a form that seeks to engage the jury with him or her personally," but the "mere use of a first person pronoun does not interject personal belief into a statement"

Commonwealth v. Silvelo, 154 N.E.3d 904, 913 (Mass. 2020)

"Although the use of [the first person by a prosecutor during arguments] has been often criticized (and discouraged) by this court and others, it is not always improper." "It is only improper when it suggests that the government has special knowledge of evidence not presented to the jury, carries an implied guarantee of truthfulness, or expresses a personal opinion about credibility." Moreover, we have held that passing use of the first person "is not plain error if it is used 'to refer the jury to the government's evidence and to summarize the government's case against the defendants.' "

United States v. Golliher, 820 F.3d 979, 988 (8th Cir. 2016)(citations omitted)

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Vouching: Outside the Evidence

"[N]o matter what defense counsel tells you, we all know that DNA is ... the most powerful investigative tool in law enforcement at this time."

The prosecutor's statement about the superiority of DNA evidence improperly vouched for the State's evidence. No opinions had been elicited about the preeminence of DNA evidence. The prosecutor's comment here—that everyone knows that DNA evidence is the best investigative tool around—did improperly vouch for the strength of the State's evidence against Newell.

State v. Newell, 212 Ariz. 389, 403, 132 P.3d 833, 847 (2006)

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Vouching: Outside the Evidence

"Remember one thing, at no time during the trial have I ever given you my reasons for offering Jeff Lange this plea agreement and I will not because I can't. If you want to know why I offered Jeff the plea agreement, ask me outside the court because the only relevance of this plea agreement which he has marked and flashed in front of you is whether that plea offer would make Jeff testify falsely

The argument in question was **patently improper**. It invited the jury to speculate about matters which had not been introduced in evidence and, even worse, those which could not have been introduced in evidence. By reassuring the jurors' doubts about the evidence through inviting conversation after the trial, the prosecutor improperly vouched his integrity and honesty. **This was a serious act of misconduct.**

State v. Woods, 687 P.2d 1201, 1209 (1984)

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Vouching: Outside the Evidence

Later, the prosecutor told the jury, "What [Trautman] underestimated was this machine called the telephone. So, I was able to have members of my staff telephone the Luxor, was able to have members of my staff telephone---"

State v. Graham, 2005 WI App 214, ¶ 11, 287 Wis. 2d 509, 704 N.W.2d 425

Well, I went over with the agents at lunch time and saw the tank ...it happens to be in a very hard to reach part of the car and there's really no need to do so when the agents have, in fact, seen the tank and can testify where it is and its size.

***

...whether the prosecutor's remarks are viewed as "testimony" from his personal knowledge or as vouching for the credibility of the state's witnesses, they were clearly improper and called to the jurors' attention facts which were not in evidence and which pertained to crucial matters for the jury's determination.

State v. Salcido, 681 P.2d 925, 926-927 (Ct. App. 1984)

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Vouching: Outside the Evidence: Demonstrative Exhibits

...the prosecutor showed the jury a baggie of rosemary and argued the photos of Olaoye's head did not show grass but rather rosemary from a bush Olaoye must have brushed against as he lay on top of S.H. In short, the prosecutor took on the role of witness to lay foundation for his manufactured, demonstrative exhibit.

State v. Olaoye, No. 1 CA-CR 19-0416, 2020 WL 7828769, at *4 (Ariz. Ct. App. Dec. 31, 2020)

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Vouching-Prestige of the Government

- A prosecutor impermissibly vouches for a witness by placing the prestige of the government behind its witnesses or suggesting that information not presented to the jury supports a witness's testimony.
- State v. Dumaine, 162 Ariz. 392, 401, 783 P.2d 1184, 1193 (1989).

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Vouching-Prestige of the Government

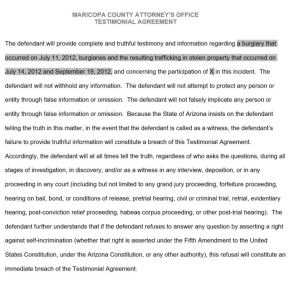
- Not a good practice to say you are "representing the people"
- "When the police have charged or arrested an individual, the County Attorney's Office reviews to determine if there is [sic] sufficient grounds to charge...."

  State v. Leon, 190 Ariz. 159, 161, 945 P.2d 1290, 1292 (1997)

22

What is NOT Vouching? (Testimonial Agreements)

- Defendant argued that the prosecutor placed the prestige of the government testimony by highlighting that a condition of their plea agreements required them to testify truthfully.
- We consistently have held that a prosecutor does not engage in misconduct merely by introducing evidence of a witness's agreement to testify truthfully in exchange for a plea agreement.
- State v. Lamar, 205 Ariz. 431, 441, 72 P.3d 831, 841 (2003), supplemented, 210 Ariz. 571, 115 P.3d 611 (2005)



MARICOPA COUNTY ATTORNEY'S OFFICE
TESTIMONIAL AGREEMENT

The defendant will provide complete and truthful testimony and information regarding a burglary that occurred on July 11, 2012, burglaries and the resulting trafficking in stolen property that occurred on July 14, 2012 and September 19, 2012, and concerning the participation of X in this incident. The defendant will not withhold any information. The defendant will not attempt to protect any person or entity through false information or omission. The defendant will not falsely implicate any person or entity through false information or omission. Because the State of Arizona insists on the defendant telling the truth in this matter, in the event that the defendant is called as a witness, the defendant's failure to provide truthful information will constitute a breach of this Testimonial Agreement. Accordingly, the defendant will at all times tell the truth, regardless of who asks the questions, during all stages of investigation, in discovery, and/or as a witness in any interview, deposition, or in any proceeding in any court (including but not limited to any grand jury proceeding, forfeiture proceeding, hearing on bail, bond, or conditions of release, pretrial hearing, civil or criminal trial, retrial, evidentiary hearing, post-conviction relief proceeding, habeas corpus proceeding, or other post-trial hearing). The defendant further understands that if the defendant refuses to answer any question by asserting a right against self-incrimination (whether that right is asserted under the Fifth Amendment to the United States Constitution, under the Arizona Constitution, or any other authority), this refusal will constitute an immediate breach of the Testimonial Agreement.

23

Appeals to Emotion

- Name Calling
  - Animals and Insults
  - Liar, Liar
- Golden Rule Arguments

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Appeals to Emotion

Why is this discouraged?

The basic philosophy behind limiting the spicing of a summation with flamboyance, drama, and emotional appeal is that the jury is seated with the expectation that they will use their intellects. Emotional appeal in any form interferes in some measure with a rational consideration by the jury. Therefore, appeals to passion or prejudice, to the extent that they are calculated to cause interference with rational consideration by the jury, are improper

6 Am. Jur. Trials 873 (Originally published in 1967)

25

Name Calling

The Rule

Given the evidence presented at trial, we find no impropriety in the prosecutor referring to Goudeau—*during closing argument*—as a "wolf" and "a wolf in sheep's clothing." There was substantial evidence that Goudeau attempted to conceal his identity by wearing disguises and circumstantial evidence that Goudeau stalked some of his victims. Comparing Goudeau to a "wolf" and describing his various disguises as "sheep's clothing," therefore, was consistent with the evidence and fell within the wide latitude permitted prosecutors in arguing to the jury.

State v. Goudeau, 372 P.3d 945, 990 (2016)

But unflattering analogies during closing arguments that are supported by facts in common knowledge are permissible.

State v. Riley, 459 P.3d 66, 104, cert. denied, 141 S. Ct. 308 (2020)

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Name Calling

"When Mr. Henry was testifying all day Friday, did the word psychopath ever come to mind?"

State v. Henry, 176 Ariz. 569, 581, 863 P.2d 861, 873 (1993)

In his closing argument, the prosecutor characterized appellant as a "monster" and as "filth"… The prosecutor also referred to appellant as the "reincarnation of the devil."

State v. Comer, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990)

27

Name Calling -Not Misconduct Based On Facts

'. . . (T)he facts show her to be a liar, a hypocrite, a forger, **a woman who would take food from hungry children**. . . . There is only one verdict that is obvious here. That is guilty, guilty, guilty-fourteen times.'

State v. Tucker, 26 Ariz. App. 376, 379, 548 P.2d 1188, 1191 (1976)

Ladies and gentlemen, what probably happened is, what these three guys were doing, is a couple of them had been drinking, they were out in their car on their way home, maybe driving around. **What these they're just punks, and they were looking for a fight.**

State v. Canisales, 126 Ariz. 331, 332, 615 P.2d 9, 10 (Ct. App. 1980)

But he did not die alone. He did not die alone, because the defendant, **like a jackal standing over a fresh kill**, turned over his dying body and picked him clean from his clothing so that he could get away with this murder. That is how Sean Kelly died.

State v. Riley, 248 Ariz. 154, 192, 459 P.3d 66, 104, cert. denied, 141 S. Ct. 308 (2020)

28

Can I call the Defendant (or a Witness) a Liar?

Answer:
Same Rule Applies—Must be Tied to the Evidence

29

Liar, Liar

The Rule

Next, the defendant urges it was reversible error for the county attorney to call defense witnesses 'liars.' There is considerable latitude allowed to counsel in argument. This includes drawing reasonable inferences from the evidence. The evidence disclosed that at least one defense witness was shown to have made contradictory statements and other defense witnesses had their testimony concerning the drunkenness of the defendant rebutted by prosecution witnesses. Although we do not approve of the language of the prosecutor, we do not find it so offensive, inflammatory or prejudicial as to require reversal.

State v. Miniefield, 110 Ariz. 599, 602, 522 P.2d 25, 28 (1974)(citations omitted)

30

Liar, Liar: Going Too Far

In more than a dozen other instances, however, the prosecutor also argued that Arias had directly wronged the *jurors*, asserting she had "looked at each and every one of [them]" and "lied to [them]" and "attempted to manipulate [them]." Further personalizing these purported deceptions, the prosecutor implored the jurors not to let Arias "scam" them, implicitly arguing that they needed to return a guilty verdict to prove that they did not "buy her lies" and could not "be manipulated." This argument improperly placed the jurors' discernment and intelligence at issue. To the point, the prosecutor impermissibly suggested that the jurors would be deluded unless they rendered a guilty verdict.

State v. Arias, 462 P.3d 1051, 1068 (Ct. App. 2020)

31

Inflaming the Passions of the Jury: Victim Sympathy

You know there's a lady in this courtroom right now…before you give any sympathy to that man—he deserves none whatsoever. Before you give him—sympathy to him, think of another woman who will be waiting for your verdict too.

On December 16th at about 7:30 in the evening she had everything to look forward to. She had her house here, they were retired, husband had a part-time job, her children are fine and well in New Jersey and at 9:30 she's at the hospital with her husband and he's dead. I can guarantee you that her life is totally destroyed. She had nothing to look forward to, nothing.

You may think sympathy for someone else but in terms of that woman, she wants justice and that's your duty to as jurors.

State v. Ottman, 144 Ariz. 560, 562, 698 P.2d 1279, 1281 (1985)

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Inflaming the Passions of the Jury: Victim Sympathy

By telling jurors they were the only ones who could give Maria justice and asking them to be her voice, all while displaying an autopsy picture, the prosecutor improperly appealed to the jurors' passions.

State v. Escalante-Orozco, 241 Ariz. 254, 282, 386 P.3d 798, 826 (2017), abrogated by State v. Escalante, 245 Ariz. 135, 425 P.3d 1078 (2018)

33

Inflaming the Passions of the Jury: "Send a Message" Arguments

"Don't tell every heroin pusher in town that he can have a gun; that he can have it loaded; that he can shoot a pig if he feels hassled and that all he need do, is take the witness stand and say, 'Yes, sir; no sir,' and claim that he had no idea that he was shooting a cop."

***

The problem with the prosecutor's statement is that it is an emotional appeal to the jury's fears. Although in closing argument both counsel have wide latitude, such an appeal to fear is improper.

State v. Mincey, 115 Ariz. 472, 484, 566 P.2d 273, 285 (1977), rev'd, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978)

**There are some cases that have approved of similar arguments reasoning that emotional overtones, appeals for justice and citing the prevalence of crime are not improper.

But 9th Circuit disapproves of "send a message" arguments. Bottom line: exercise caution here!

34

Inflaming the Passions of the Jury: Fear and Future Danger

You know, the next time you are out on a nice, pretty, sunny afternoon, perhaps with your family, and you are driving along the roads or maybe you are at a picnic, your radio is on and you hear about a murder or something like that, or an aggravated assault, you think back to this case you are going to have to be able to say right then and there that you were convinced that the evidence was clear and convincing that this man was insane. Not just paranoid schizophrenic, not mentally ill, not possibly mentally ill, but insane. Because you know, you go back there in your deliberation now and you're sitting there and you can't imagine that day, ladies and gentlemen, when you hear this on the report and you can't say, yes, I was clearly convinced, you know, that the defendant carried his burden.

In re Zawada, 208 Ariz. 232, 237, 92 P.3d 862, 867 (2004)

State v. Hughes, 193 Ariz. 72, 88, 969 P.2d 1184, 1200 (1998)

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Inflaming the Passions of the Jury: Fear and Future Danger

The prosecutor's remarks were, to say the least, improper. He accused defense counsel of talking 'out of two sides of his mouth, or as the Indian might say a forked tongue.' He referred to one of the defendant's chief witnesses as a 'liar,' and called her testimony 'dishonest.' Reference was made to defense counsel as a 'poor, humble, simple little fellow,' who was playing games with the jury. The prosecutor made several references to the bible, religion and races. Possibly his most callous remarks were directed to the function of the jury: 'Let's quote the bible and be generous. Let's go out here 400 yards and open the gates and let him out. And when somebody comes along and kills you and they ask the County Attorney, 'What kind of a job are you doing over there?'-I won't have the job then-but as County Attorney, I will tell the survivors, 'Well, we have got kind hearts. We don't prosecute anybody.''

State v. Gonzales, 105 Ariz. 434, 436, 466 P.2d 388, 390 (1970)

36

Golden Rule

- Although prosecutors have wide latitude in closing argument, they may not make arguments that appeal to the jury's fear or passion. This includes inviting jurors to place themselves in the victim's position because doing so plays on the jurors' fear of the defendant or sympathy for the victim.
- Normally, this comes up in the context of civil trials: If you were injured, how much would you want to be compensated?

In both his opening and closing statements, the prosecutor repeatedly told the jurors to imagine themselves in the shoes of the victim, Ms. Jacobsen. In his opening statement, the very first sentence spoken by the prosecutor was, "Imagine you just had your mother's funeral, it's January 26th, 2013, and you date [Mr. Brown]." The prosecutor went on asking the jurors to "imagine" themselves in the position of Ms. Jacobsen several more times throughout his opening statement and continued this practice during closing statement. The prosecutor's actions were clearly improper.

Brown v. State, 2014 WY 104, ¶ 21, 332 P.3d 1168, 1175 (Wyo. 2014)

37

Some Tips About Emotional Appeals

- Don't personalize matters for an individual juror/the jury
- Make Sure You Have a Basis Before Ever Referring to:
  - Catastrophic Historical Events
  - Mass Murderers and Serial Killers
  - Religious Texts
  - Controversial Political Topics

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Disparaging the Defense Attorney

39

Attack the Argument Not the Attorney

- It is always improper for the prosecutor to "impugn the integrity or honesty of opposing counsel." *State v. Newell,* 212 Ariz. 389, 403 ¶ 66, 132 P.3d 833, 847 (2006) (holding it was improper to imply that defense counsel was arguing for a position he knew to be false).
- "Criticism of defense theories and tactics is a proper subject of closing argument." *State v. Ramos,* 235 Ariz. 230, 238 ¶ 25, 330 P.3d 987, 995 (App.2014) (quoting *United States v. Sayetsitty,* 107 F.3d 1405, 1409 (9th Cir.1997)).
- In *Ramos,* the court ruled that the prosecutor's accusation that the defense raised "red herrings" and asked the jury to "check [their] common sense at the door" was proper criticism of defense tactics even though it suggested that defense counsel attempted to mislead the jury. *Id.* at 237–38 ¶¶ 24–25, 330 P.3d at 994–95

40

Caution: Role of Defense Attorney vs. Prosecutor

- Looking at jobs, Mr. Hippert's job was to get his client off. That's it. My job is to produce this evidence and argue from it and ask you to convict for a crime which Mr. Smith should not be let go. Mr. Hippert is asking you to let him go, to let him walk out of the courtroom after being involved in the things he did.

  State v. Smith, 138 Ariz. 79, 83, 673 P.2d 17, 21 (1983)

41

Unnecessary Reference to Opposing Counsel

Prosecutor:

- "And pay particular attention to something Counsel said to you in his argument, and remember this, that he didn't know what the witnesses were going to say. He's defending this man on serious charges, but he put these people up without talking to them. Ask yourself a question. A man defending another man, bring on witnesses—'
- 'Just remember the logic of that. **Defending a man and not bothering to talk to the witnesses before he puts them on?** The State submits don't buy it.'"
- State v. Gregory, 108 Ariz. 445, 448, 501 P.2d 387, 390 (1972)

42

Ellen's Personal Experience

But the prosecutor's statements during argument were improper. Disputing Defendant's testimony that his fingerprint was found in C.P.'s vehicle as a result of his frequent liaisons with women, the prosecutor stated in rebuttal argument:

Did you hear [defense counsel] talk about that fingerprint? Not a whole lot. Not a whole lot. Did you hear him talk about the women showing up in the middle of the night? *I bet you a million dollars he wished his client didn't say that, because that's a tough one as an attorney standing up here trying to defend that; that's a low point in an attorney's life to have to make that argument, because it's absolutely absurd, absurd.* You would have to believe that story about women rolling through in the middle of the night to explain the fingerprint to—for there to be a reasonable doubt. And it has to be a reasonable doubt here. That story which, again, [defense counsel] elected, understandably, not to repeat to you is *absolutely laughable.* ...

(Emphases added.) By these statements, the prosecutor expressed a personal opinion concerning a credibility determination. This was improper. Ariz. R. Sup.Ct. 42, ER 3.4(e).

State v. Lopez, No. 1 CA-CR 14-0239, 2016 WL 386882, at *6 (Ariz. Ct. App. Feb. 2, 2016)

43

Constitutional Rights and Closing Argument

- Right to Not Testify
  - Courtroom Demeanor?
- Burden Shifting
- Right to Remain Silent

44

Commenting on Defendant's Constitutional Rights

The prosecutor who comments on defendant's failure to testify violates both constitutional and statutory law.

See Ariz. Const. art. 2, § 10; A.R.S. § 13–117(B)

The prosecutor told the jury that only two people knew details about the crime: **" 'One is Jack Jewitt and the other one is sitting right here at the table asking you not to hold him accountable through his lawyer.' "** We held that the statement was an impermissible comment on defendant's failure to testify.

State v. Trostle, 191 Ariz. 4, 16 (1997)

45

Comment on Right to Remain Silent - Improper

The defendant did not take the stand in his own behalf. In his closing argument to the jury, the prosecutor made the following remark:

"There is just one question that we leave with you to go into the jury room, and that question was the question **that was never answered by the defendant** ; where was the defendant on Friday night, July 25?" (emphasis added)

State v. Cannon, 118 Ariz. 273, 274, 576 P.2d 132, 133 (1978)

- The verdict was reversed and case remanded

46

Defendant's Courtroom Demeanor and Right to Remain Silent

- In closing, the State compared Payne's lack of emotion at trial to the excessive emotion he displayed during his interrogation. We have not confronted directly whether a prosecutor may ask jurors to consider a defendant's affect at trial, but most courts that have addressed this issue have found such comments improper.
- State v. Payne, 233 Ariz. 484, 514, 314 P.3d 1239, 1269 (2013)

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Courtroom Demeanor

We urge courts and prosecutors to proceed cautiously in this area, given its dubious relevance and potential to implicate a defendant's right not to testify. We decline to set forth an absolute rule that such statements are always improper, however, preferring to let trial courts assess the totality of the circumstances in each case. ***We caution that while the jury may observe a defendant's demeanor, a prosecutor's reference to the demeanor of a non-testifying defendant may draw attention to the defendant's failure to testify and is based on evidence not presented at trial and not covered by any jury instruction.***

- State v. Payne, 233 Ariz. 484, 514, 314 P.3d 1239, 1269 (2013)

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Burden Shifting

Due process commands that no man shall lose his liberty unless the Government has borne the burden of * * * convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' …

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970)

The state always bears the burden of proving every element of a criminal offense; this burden never shifts.

See State v. Klausner, 194 Ariz. 169, 171, ¶¶ 9–11, 978 P.2d 654, 656 (App.1998).

- What constitutes burden shifting?

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Not Burden Shifting

"It is well settled that a 'prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, so long as the comment is not phrased to call attention to the defendant's own failure to testify.' " *State v. Herrera,* 203 Ariz. 131, ¶ 19, 51 P.3d 353, 359 (App.2002), *quoting State v. Fuller,* 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985).

Our supreme court has stated: "It strikes us as elemental fairness to allow the State to comment upon the defense's failure to adduce potentially exculpatory evidence to which defendant had access when defendant is attacking the accuracy of the State's evidence."

State v. Edmisten, 220 Ariz. 517, 525, 207 P.3d 770, 778 (Ct. App. 2009)

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Not Burden Shifting but…

If you are going to indicate that the Defense could have called a witness or produced a document, be VERY CAREFUL!!

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What Can I Do?

"The State always has the burden of proof and that burden NEVER shifts. However, if there was a witness that the Defense wanted to subpoena – they have that ability. But, let me be clear – the State always has the burden of proof and that burden NEVER shifts."

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Silence, Miranda and Mistrial

Pre-Arrest Silence

The Fifth Amendment, however, does not prohibit comment on a defendant's pre-arrest silence, absent state action compelling him to speak. *State v. Lopez*, 230 Ariz. 15, 20, ¶¶ 16–17 (App. 2012) (citations omitted).

Post-Arrest/Pre-Miranda Silence—DON'T DO IT!

When a person is in custody, even if police have not given *Miranda* warnings or begun interrogation, the prosecution's subsequent " comment on the defendant's exercise of his right to silence violates the Fifth Amendment." State v. VanWinkle, 229 Ariz. 233, 237, 273 P.3d 1148, 1152 (2012)(citations omitted)

Post-Miranda Silence—DON'T DO IT!

It is well established that a prosecutor may not use a defendant's post-arrest, post-*Miranda* silence to impeach the defendant or as evidence of the defendant's guilt. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976); *State v. Mauro*, 159 Ariz. 186, 197 (1988).

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A False Inference is a False Argument

- Prosecutor's comment during closing arguments of sexual assault of a child trial, in which prosecutor told the jury that the defendant had never denied committing the offense until he took the witness stand, was improper; prosecutor had possession of two police reports showing that defendant immediately denied committing the offense, and thus prosecutor misled jury into drawing an inference not supported by record and which prosecutor knew or should have known was untrue.

  State v. Weiss, 2008 WI App 72, 312 Wis. 2d 382, 752 N.W.2d 372

- It was reversible error in a rape prosecution, for the prosecutor to argue in closing that there was no evidence the victim was a prostitute when in fact the evidence of the victim's prostitution activities were precluded by the rape-shield statute. The prosecutor unfairly exploited exclusion of evidence.

  Com. v. Harris, 443 Mass. 714, 825 N.E.2d 58 (2005)

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FALSE ARGUMENTS

- NEVER argue an inference that you know is false
- The rules of evidence may artificially restrain the information a jury is allowed to hear. From that evidence you can argue reasonable inferences, BUT NOT inferences you personally know to be false.

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RULES FOR POWERPOINT

- Contain Only Images that have been admitted into evidence at the trial
- The Information should not contain personal opinion
- Do Not misstate the law

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RULES FOR POWERPOINT: RULE 1

Only photographs or videos that have been stipulated to or ruled upon pre-trial should be used in an opening. Clearly, only those which have been admitted should be used in the closing.

Three of the photographs contained in the opening PowerPoint were later excluded because they were cumulative, not because they were irrelevant or too gruesome. State v. Dann, 220 Ariz. 351, 363, 207 P.3d 604, 616 (2009)

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RULES FOR POWERPOINT: RULE 2

- Do not misstate the law. Screen shot or copy the jury instructions as approved by the court.

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the alleged aggravating circumstance is proven. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are firmly convinced that the alleged aggravating circumstance is proven; you must find that the alleged aggravating circumstance exists. If, on the other hand, you think there is a real possibility that the alleged aggravating circumstance is not proven, you must give the defendant the benefit of the doubt and find the alleged aggravating circumstance not proven.

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RULES FOR POWERPOINT: RULE 3

Do Not State Your Personal Opinion

Example:

An opening statement PowerPoint presentation which included a slide that showed the defendant's booking photo with the word "GUILTY" written across the defendant's face was improper.

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